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No. 82-128

IN THE

Supreme Court of the United States

1982

CLAYTON E. RUNCK, JR., HERMAN SOBANIA and GEORGE SCHULZ,

Petitioners,

vs.

PHOENIX ASSURANCE COMPANY OF CANADA, NORWICH UNION FIRE SOCIETY, LTD., ROYAL INSURANCE COMPANY OF CANADA, SUN INSURANCE OFFICE, and WAWANESA MUTUAL INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant in a civil case, in which an insurance company seeks a refund of losses paid on an insurance policy and alleges that the defendant committed arson, may be compelled to answer potentially incriminating questions, where he has consistently claimed the privilege against self incrimination under state and federal law.

2. Whether the protection, provided by the Fifth and Fourteenth Amendments to the United States Constitution, against self incrimination can be invoked to protect an American citizen against self incrimination as to crimes committed in a foreign country, in this case Canada.

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The respondents, Phoenix Assurance Company of Canada, Norwich Union Fire Society, Ltd., Royal Insurance Company of Canada, Sun Insurance Office, and Wawanesa Mutual Insurance Company, respectfully request that this Court deny the petition for writ of *certiorari*, seeking review of the North Dakota Supreme Court's opinion in this case. That opinion is reported at 317 N.W.2d 402 (N.D. 1982).

OPINIONS BELOW

The petitioners' Petition for Writ of Certiorari makes no reference to the most recent order of Judge Edward J. Devitt of the United States District Court for the District of Minnesota dated 12 July 1982, granting the respondents access to the grand jury testimony of Clayton E. Runck, Jr. and George Schulz. A copy of the most recent order, marked Appendix A, is attached to this brief. This order was entered following a bench ruling by Judge Devitt at a hearing held on 14 June 1982, in St. Paul, Minnesota.

JURISDICTION

This is as stated in the petitioners' petition.

CONSTITUTIONAL PROVISIONS INVOLVED

This is as stated in the petitioners' petition.

STATEMENT OF THE CASE

The petitioners assert in their Statement of the Case that they have resisted all efforts by the respondents to compel the petitioners to testify and that they have consistently claimed the Fifth Amendment privilege. In fact, the petitioner, George Schulz, testified at a deposition taken in this case on 7 April 1980, in Fargo, North Dakota, and fully implicated himself and the other two petitioners in the planning, execution, and concealment of the arson-fraud referred to in the respondents' Second Amended Complaint.

Mr. Schulz had also appeared before a federal grand jury in St. Paul, Minnesota, on 7 April 1977, and at that time

had admitted his involvement along with that of Mr. Runck and Mr. Sobania in the subject arson-fraud. Mr. Runck appeared before another federal grand jury in St. Paul on 9 February 1979, in exchange for a grant of immunity from further prosecution, and admitted, among other things, that Mr. Schulz had told Mr. Runck of Mr. Schulz's involvement in setting the subject fire. *Phoenix Assurance Co. of Canada v. Runck*, 317 N.W.2d 402 (N.D. 1982), at 412.

The petitioners also assert that the subject grand jury testimony was not lawfully disclosed. The attached order of Judge Devitt, dated 12 July 1982, grants the respondents access to the grand jury transcripts of Clayton E. Runck, Jr. and George Schulz on the basis that the respondents have made the necessary showing of particularized need.

There has not been any trial, and the disputes involved concern pre-trial discovery matters.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Neither the decision below nor the record raises the questions presented in the petition.

George Schulz was granted immunity from prosecution in exchange for his appearing before a federal grand jury. *Phoenix Assurance Co. of Canada, supra*, at 406. He fully implicated the three petitioners then, and he essentially reiterated that testimony at his deposition taken on 7 April 1980. Mr. Schulz made no attempt prior to that time to take an appeal to a higher court, and he has, in effect, waived his Fifth Amendment privilege by having already testified and by not having properly preserved his rights to appeal.

Herman Sobania was not granted immunity from prosecution, and he did not testify before a grand jury. *Id.*, at 406. The court below ruled that he would be entitled to invoke the Fifth Amendment privilege, and there is nothing to establish a connection between his situation and the questions raised here. He has no need to be involved in this proceeding.

The trial court in this case found that Clayton Runck did not face a "real and appreciable" danger of incrimination within the meaning of the applicable North Dakota law. See Appendix C attached to the petitioners' petition, citing *Dorgan v. Kouba*, 274 N.W.2d 167 (N.D. 1978). Here, the North Dakota Supreme Court affirmed the trial court's order relating to the Fifth Amendment issues, and one can reasonably argue that the North Dakota Supreme Court affirmed the decision on the basis that the petitioners had failed to establish that they faced a real and substantial danger of criminal prosecution as a result of any compelled disclosures. The discussion in the decision below relating to the issue of whether the Fifth Amendment privilege can be asserted in the face of a possible foreign prosecution is dicta. Consequently, the decision below does not squarely raise the key issue presented in the petition.

2. The decision of the North Dakota Supreme Court is correct.

The court below affirmed the trial court's determination that the petitioners had failed to establish any real and appreciable danger of criminal prosecution as a result of any compelled disclosures. Although the United States Supreme Court has never reached the question of whether the Fifth Amendment privilege extends to a possible foreign prosecu-

tion, there is nothing the petitioners have presented to establish that the court has inaccurately applied any applicable law. The North Dakota court pointed out that Mr. Runck:

> is in a poor, if not in an untenable, position to now refuse to testify on the grounds that his testimony might subject him to possible foreign prosecution because that same risk was present when he testified before the grand jury. *Id.*, at 412.

In effect, the court concluded that Mr. Runck and Mr. Schulz had waived the privilege by agreeing to accept immunity from further prosecution and by testifying to a grand jury about their knowledge of the subject arson-fraud.

The North Dakota Supreme Court opinion does not conflict with any decisions of the United States Supreme Court, and there is no conflict between any courts of appeal on the questions raised. The case relied on most heavily by the petitioners for their argument that the court below has misapplied the law is *In Re Grand Jury Subpoena of Martin Flanagan*, 533 F.Supp. 957 (E.D.N.Y. 1982). *Flanagan*, a lower court decision, is not factually similar to the case at bar. Mr. Flanagan was an unindicted co-conspirator in a gun-running scheme who was brought before a federal district court on a contempt proceeding to compel his testimony before a federal grand jury. The court found that Mr. Flanagan had a reasonable fear of foreign prosecution since the foreign jurisdictions involved were actively prosecuting alleged Irish Republican Army terrorists. Here, the subject fire occurred more than ten years ago, and the Canadian prosecutors with authority to proceed have filed an affidavit with the trial court indicating that they have no present intentions of prosecuting the petitioners. This is completely different from the situation described in *Flanagan*.

CONCLUSION

First, the decision below does not squarely raise the key issue which the petitioners want this Court to review, *i.e.*, whether the Fifth Amendment privilege applies to a possible foreign prosecution. The question is an important one, but this court should wait for a different case where the problem is more appropriately involved. Second, the decision below was correctly decided, and there is no appreciable chance that the petitioners will be criminally prosecuted. Third, this case is still in a preliminary stage, and denying the petition would uphold the policy of discouraging piecemeal appeals. The petition should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

UNITED STATES OF AMERICA

vs.

CLAYTON RUNCK, JR.

CRIMINAL 6-78-38, 6-78-39

NOTICE TO COUNSEL PURSUANT TO RULE 49(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

You are hereby notified in the above entitled case, that on July 12, 1982, we filed the following:

ORDER (Devitt-J) Ordered that Canadian Insurers' Petition for Order dated 5-27-82, is granted since the insurers have now made the necessary showing for the release of the grand jury transcripts. Further Ordered the grand jury testimony of Clayton Runck, Jr. and George Schulz may be disclosed to the insurers and their attorneys in connection with the Civil proceedings pending in the Cass County District Court of North Dakota.

ROBERT E. HESS, CLERK
By SUZANNE H. RUIZ,
Deputy Clerk

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